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IT IS SO ORDERED.

Dated: September 29, 2011




Guy R. Humphrey
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: MEGAN T. SULLIVAN,

Debtor

Case No. 11-30910

Adv. No. 11-3263

MEGAN T. SULLIVAN,

Plaintiff

Judge Humphrey

Chapter 13

v.

WESBANCO BANK, INC.,

Defendant

**Memorandum Order Denying Plaintiff's Motion for Default Judgment (Doc. 9)
and Allowing Defendant's Answer as Part of the Record (Doc. 3)**

This adversary complaint was filed on July 29, 2011 (doc. 1). On September 1, 2011 Defendant WesBanco Bank, Inc. (the "Defendant") through counsel filed an *Answer to Plaintiff's Complaint to Avoid Junior Mortgage Lien of WesBanco Bank, Inc.* (the "Answer") (doc. 3). On September 19, 2011, the Plaintiff moved for default on the basis that the Answer

was not timely filed (doc. 9). On September 22, 2011 the Defendant filed a response arguing that the Answer was timely filed pursuant to Bankruptcy Rule 9006(a)(1) and (f).

Bankruptcy Rule 9006(a)(1)¹ provides that, in computing any time period under the Bankruptcy Rules, the day of the event triggering that time period is excluded and, if the last day is a Saturday, Sunday, or legal holiday, the period runs to the next day that is not a Saturday, Sunday, or legal holiday. In this case, the summons was issued on July 29, 2011. Because Rule 7012(a) requires a defendant to serve an answer within 30 days after the issuance of the summons, the Defendant was required to serve its Answer by August 28, 2011. However, since this date was a Sunday, the period did not run until August 29, 2011. The Defendant did not, in fact, file and serve its Answer until September 1, 2011, which was two days late. The Defendant maintains, nevertheless, that its answer was timely because the complaint and summons were served by mail.

Rule 9006(f) provides that when there is a requirement to act within a prescribed period after service by mail, three days are added. The time period prescribed by Rule 7012(a) is calculated based upon the issuance of the summons, not the service. Thus, the time period during which a defendant has to serve an answer to a complaint begins to run on the date that the summons is issued. The date of the mailing or other service of the summons and complaint does not affect the time that a defendant has to answer the complaint. Accordingly, the court concludes that the three day mail provision of Rule 9006(f) is not applicable to the time period during which the Defendant had to serve its answer. See *Brody v. Brody (In re Brody)*, 97 B.R. 158, 160 (Bankr. E.D.N.Y. 1987). Because this provision is inapplicable, the court need not determine whether the Defendant was correct in adding the three days to the end of the 30-day period rather than at the beginning. Compare *Lerro v. Quaker Oats Co.*, 84 F.3d 239, 242 (7th Cir. 1996) with *Epperly v. Lehman Co.*, 161 F.R.D. 72, 75 (S.D. Ind. 1994).

Nevertheless, upon the court's review of the foregoing pleadings and filings, the court **denies** the Plaintiff's *Motion for Default Judgment on Complaint to Avoid the Junior Mortgage Lien of WesBanco Bank, Inc.* (doc. 9). This adversary proceeding is in its early stages, no prejudice results to the Plaintiff, the Defendant's proposed Answer raises meritorious defenses to be litigated and, most importantly, the Sixth Circuit has consistently asserted a strong preference for trials on the merits. *Shephard Claims Serv., Inc. v. William Darrah and Assoc.*, 796 F.2d 190, 193 (6th Cir. 1986). The Sixth Circuit has indicated this strong preference, even when a default has previously been entered, which has not occurred in this adversary proceeding. See *United Coin Co., Inc. v. Seaboard Coastline R.R.*, 705 F.2d 839, 846 (6th Cir. 1983).

Based upon the foregoing, the court accepts the Defendant's Answer (doc. 3) as part of the record in this adversary proceeding.

¹ All references to any "Rule" in this order are to the Federal Rules of Bankruptcy Procedure.

The court notes that pursuant to the Order entered on September 8, 2011 (doc. 4) preliminary pretrial statements are due not later than October 11, 2011.

IT IS SO ORDERED.

Copies to:

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